IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1327

JOHN E. SAVAGE and THE LORRAINE CORPORATION, a Corporation,

Petitioners,

vs.

DAVID G. LORRAINE and L. F. BAASH, Receiver,

Respondents.

RESPONDENTS' REPLY TO PETITION AND SUPPORTING BRIEF.

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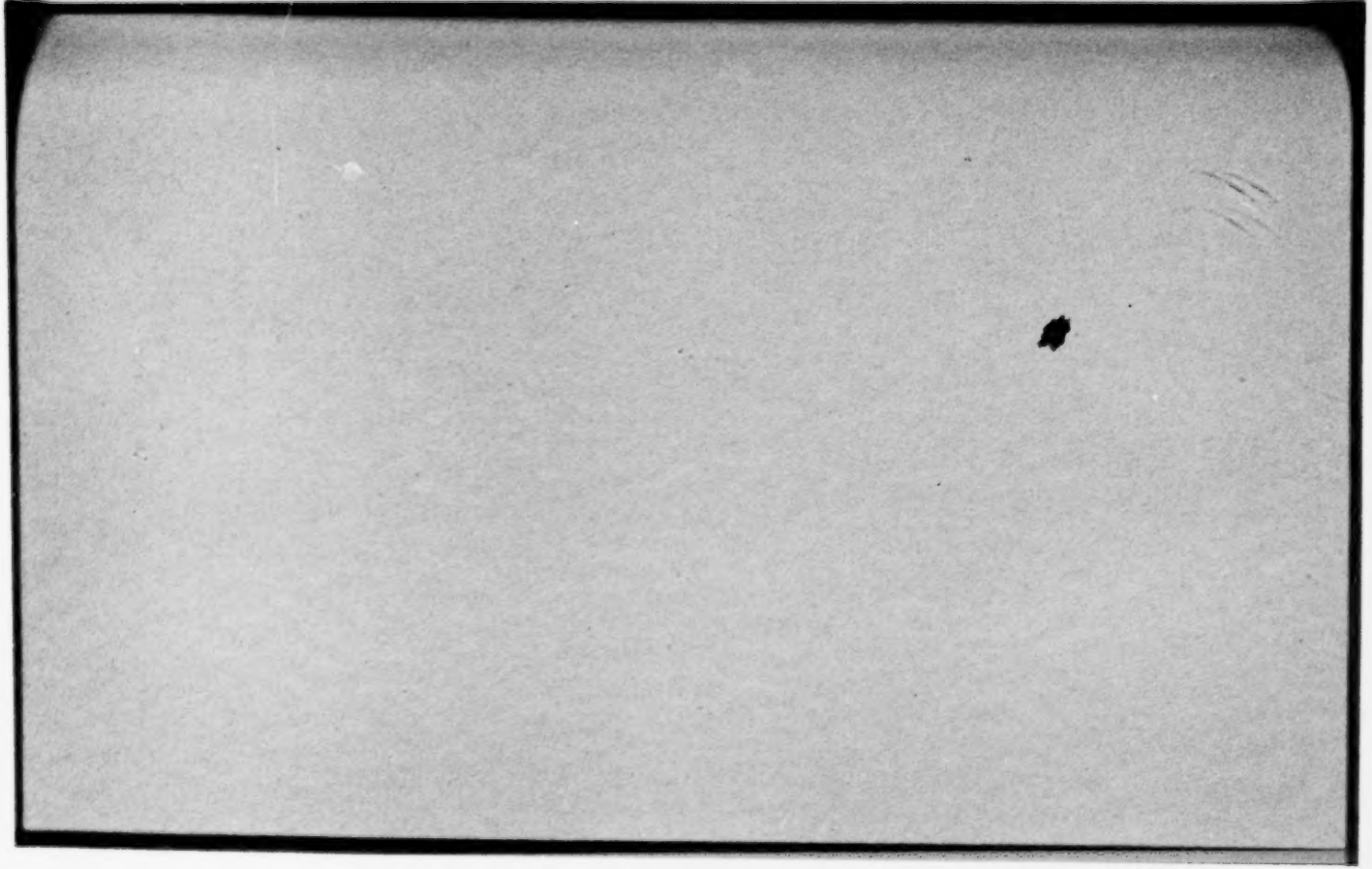

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Respondents.

RESPONDENTS' REPLY TO PETITION AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents respectfully present this reply to the pending Petition for Writ of Certiorari, and supporting brief herein:

Questions Presented.

The pending petition does not present any question which properly invokes action by this Honorable Court.

The decision of the Honorable District Court rests upon factual determinations wherein the evidences were sharply in dispute. The decision of the Honorable Circuit Court of Appeals is grounded upon the well settled rule that in these circumstances findings of fact made by the District

Court will not be disturbed unless unsupported by the proofs.

Each of the orders made by the Honorable District Court subsequent to the entry of judgment involves an exercise of discretion and it does not appear that such discretion was in anywise abused.

Statement of the Case.

Petitioners' statement of the case is fragmentary and misleading. Petitioners' statement [page 5] that respondents employed John E. Savage to negotiate with prospects for the purpose of refinancing the Lorraine Corporation ignores the fact that the contract which underlies this action is in writing [Plaintiffs' Exhibit 1, R. 335] and expressly obligates Mr. Savage to exercise the option thus held by David G. Lorraine in respect of the purchase of stock in said corporation. The importance of this obligation is obvious. Petitioners' position completely ignores this obligation.

The primary defense offered by Mr. Savage was his claim that he thought this contract was "*phony*" and did not mean anything. [R. 842-843 incl.] This claim falls of its own dead weight. Mr. Savage is an experienced business man. He never told the Lorraines or anyone that he thought this contract was phony. He immediately went to work under this contract and performed his obligation by consummating the purchase of this stock. He told the witnesses, Nall and Young, that he had purchased this stock for Lorraine. He did not repudiate his trust until the company went over the top, under Lorraine management, and was enjoying a period of splendid profits. His defense is purely devoid of merit, as found by the trial court and affirmed by the circuit court.

Argument.

Question 1. This question assumes that the trust found by the trial court was an *implied* trust but the facts are it is an *express* trust clearly and unequivocally declared by the contract between the parties. In these circumstances the cases cited by petitioners have no application. They deal only with circumstances in which a trust, if shown, must be implied from parol evidences.

But were this a case in which the trust must be implied from parol evidences, nevertheless the evidences are so clear and convincing as to leave no doubt as to the intentions of the parties to establish the trust.

Question 2. As a secondary defense, petitioners say that Lorraine is estopped to declare and enforce this trust, because of the letter which he and Mrs. Lorraine, and Mr. Cobb, signed on June 24th in the office of Mr. Bodkin. This claim has no merit. It rests (1) upon Mr. Savage's testimony that he would not have purchased this stock if the Lorraines had not signed that letter [R. 858]; and (2) upon the statement in the last paragraph that they (the Lorraines and Cobb) understood that Mr. Savage had purchased these shares "*at foreclosure sale*" and that they would not at any time assert any claim or title to said stock.

Independently of the testimony of Mr. and Mrs. Lorraine as to what occurred at the signing of this letter, there is no estoppel because (a) it appears that the letter was neither required nor given for the benefit of Savage. He had nothing to do with it; (b) it appears that he had closed this deal before this letter was mentioned. He had closed the deal in each of two ways. On the day before he had made a written offer to buy, and on that day, before the meeting at which this letter was signed, he had

received a written acceptance of that offer. These (the offer and acceptance) constituted a firm contract for his purchase of these shares. In addition to this, he had gone through the unnecessary ceremony of purchasing these shares at a foreclosure sale at the bank. The letter states that the parties understood that Mr. Savage *"has purchased these at foreclosure sale."* Why Bodkin, Demoss and Savage thought it was necessary, or desirable, or even proper, to hold such a *"phony"* sale after Bodkin and Savage had already agreed in writing upon the sale of said shares by Bodkin to Savage at the same price and upon the same terms as those stated at the foreclosure sale, is not explained. But the fact is that Bodkin had bound himself to sell, and Savage had bound himself to buy, these shares, and the parties had met to make the formal transfer, ***before anyone suggested this letter;*** and (c) in these circumstances Savage did not part with anything or in anywise alter his position upon the strength of the signing of this letter by the Lorraines. In these circumstances, there could not be any estoppel. [R. 479-494.]

This conclusion is fortified by the fact that it does not appear from the testimony of anyone that Savage had any interest in this letter. If he had any interest he successfully concealed it from the Lorraines. The Lorraines testified that at the time they were asked to sign this letter, Mr. Bodkin told them that it would not affect any arrangements they wished to make with Mr. Savage, and that Mr. Lorraine then said that they had an agreement with Mr. Savage. They both testified that Mr. Savage was present, heard this statement and made no comment. While this testimony was disputed, the dispute did no more than to present an issue for the trial court to determine. Its determination is final on this appeal.

Furthermore, Mr. Savage testified [R. pp. 855, 856] that he had not been informed that any such letter was to be requested from the Lorraines; that he had not seen the letter before it was read to the Lorraines by Mr. Bodkin; that he (Savage) was not asked to sign the letter or to consent to it; that nothing was said as to why Bodkin wanted that letter, and that he (Savage) *"wondered myself for a while, but never gave it any great thought and didn't pay much attention to it."*

Question 3. Petitioners' criticism of the order of the District Court which appointed a receiver for the petitioning corporation is wholly without merit.

The Facts.

On January 20, 1944, when the Receiver herein was appointed, the evidences before the District Court fully supported the following facts, and the court found:

(a) That there were issued and outstanding 1,194,450 shares of the authorized capital stock of the corporate appellant. Of these shares, appellee (herein referred to as "Lorraine") and his wife and daughter owned and held an aggregate of 448,624.50 of said shares and, in addition thereto, appellee was the equitable owner of the 550,472.65 shares of said issued stock, held by said appellant, John E. Savage, in trust as declared by the judgment herein.

(b) That subject only to his redemption of said 550,472.65 shares of stock from the trust of which said John E. Savage was trustee, as aforesaid, Lorraine was entitled to vote 999,097 shares of said 1,194,450 shares then issued and outstanding.

(c) That after the entry of the judgment herein, [R. 149] which declared that said John E. Savage held

said 550,472.65 shares of stock in trust for Lorraine and subject to redemption as therein provided, and before the appointment of said Receiver, Lorraine had tendered to said John E. Savage payment in currency of the full amount of Lorraine's personal indebtedness to said John E. Savage as found by the court in its order of January 10, 1944 [R. 213-217], and, said John E. Savage having refused to accept said payment, Lorraine had deposited with the clerk of said District Court a cashier's check drawn in favor of said John E. Savage in the sum of said indebtedness, both principal and interest, to and including the date of said tender, and had given to said clerk instructions to deliver said cashier's check to the order of said John E. Savage upon his demand.

(d) That arrangement had been made whereby said corporate petitioner could obtain the moneys with which to pay the indebtedness of said corporation to said John E. Savage as of the close of business on November 30, 1943, as determined by the order of said District Court on January 10, 1944, and which payment was required to be made to complete Lorraine's redemption of said 550,472.65 shares of stock from the trust of which said John E. Savage was trustee, as aforesaid [R. 229].

(e) That Lorraine had also tendered to said John E. Savage, 50,000 shares of the issued capital stock of said corporation, free and clear of encumbrances, as his compensation as agreed upon in the contract which evidences the trust as declared by the judgment herein and that said John E. Savage had rejected said offer.

(f) That said John E. Savage was then in control of the board of directors of said corporation. That said board consisted of three members. These were, said John E. Savage, Earl C. Demoss, his personal attorney, and a

non-stockholder, and one Wally Rutherford, a personal friend of said John E. Savage, and whom said John E. Savage had selected and caused to be appointed to said office on January 5th, 1944 [R. 922-938]. At the time of his appointment, Mr. Rutherford was not a stockholder in said corporation [R. 920]. Thereafter, and before the appointment of said Receiver, said John E. Savage represented to the District Court herein that said Wally Rutherford had purchased the 18,000 shares of stock held by Mr. Wagner, who had retired as a director on said 5th day of January [R. 1067]. Later, said John E. Savage admitted in open court that he, said John E. Savage, had furnished the money for the purchase of said shares.

(g) That said John E. Savage was then president and said Earl C. Demoss was then secretary and treasurer of said corporation.

(h) That said Earl E. Demoss and Wally Rutherford were wholly subservient to the wishes of said John E. Savage in respect to said corporation [R. 921, 978], and as directors and officers of said corporation they acted in accordance with the expressed desires of said John E. Savage.

(i) That said John E. Savage did not own any stock in said corporation other than the 50,000 shares tendered to him by Lorraine, as aforesaid, and the 18,000 for whose purchase in the name of said Wally Rutherford, between the 5th and 20th days of January, 1944, said John E. Savage had furnished the money, as aforesaid. [R. 1067.]

(j) That by virtue of his control of said corporation, as aforesaid, said John E. Savage excluded Lorraine from access to the records of said corporation showing the backlog of orders on hand, the cost of operations and the personnel of the company's employees and refused said

information to Lorraine [Aff. S.R.L., R. 206, Vol. I]. That in open court on January 6th, 1944, said conduct of said John E. Savage was brought to the attention of the court and thereupon, under the promptings of the judge of said court, said John E. Savage and said Earl C. Demoss agreed that Lorraine could have access to all of the records of said corporation and might have the same examined by Lorraine's wife, who for a long time prior to May 23rd, 1943, had had charge of the keeping of said records, and an auditor to be selected by Lorraine. That thereafter, and in accordance therewith, Mrs. Lorraine and an auditor selected by her, visited the offices of said corporation and were then and there, and at all times thereafter, denied access to the records of said corporation containing said information, and were refused said information by said John E. Savage, and by reason thereof, such records had not been examined and such information had not been obtained.

(k) That said corporation was engaged in the business of producing oil well equipment, and essential parts for the fabrication of airplanes, all of which required a high degree of technical care, skill and experience, and that in its business said corporation was dependent for contracts for the production of said aircraft parts, which constituted more than 90% of the business of said corporation, upon the goodwill of the agencies of the armed forces of the United States, and of the airplane manufacturers, and particularly of the Douglas Aircraft Corporation, Inc.

(l) That said John E. Savage was wholly inexperienced [R. 780, also 832 to 838, Vol. II, inclusive], incapable, and ignorant in respect of the work in which said corporation was engaged and upon which it was dependent, and by reason thereof said corporation, under the

control of said John E. Savage, as aforesaid, had lost the confidence and respect of the agencies with whom said corporation was dealing and was required to deal, and particularly of said Douglas Aircraft Corporation, Inc., and that by reason thereof said Douglas Aircraft Corporation, Inc. was refusing to transact any further business with said corporation. [Exhibit "A," R. 197, R. 200, "B", R. 201, R. 202, R. 203, R. 1233.]

(m) That said corporation, prior to the assumption of said John E. Savage of control thereof, had contracted with said Douglas Aircraft Corporation, Inc. for the development and manufacture of a very complicated and important valve for use on airplanes [R. 1077], and had agreed with said Douglas Aircraft Corporation, Inc. that the price to be paid therefor to said corporation would be adjusted after said valve had been developed and a sufficient number thereof had been manufactured in circumstances which would properly indicate the reasonable cost thereof, and that the final price which said Douglas Aircraft Corporation, Inc. would be required to pay to said corporation therefor would be determined, and as adjustment made in accordance therewith. [R. 197, 206, 209.]

That after said John E. Savage assumed control of said corporation, and while under his control and acting under his direction, said corporation refused to abide by said agreement and refused to negotiate with said Douglas Aircraft Corporation, Inc., in respect thereof, and demanded the immediate payment of about $64,000.00 [R. 1028], which, at the price set forth in the purchase orders, was owing for valves delivered by said corporation thereunder, but which was subject to re-negotiation as hereinbefore stated.

That said re-negotiation of said price was required by the agencies of the armed forces of the United States.

That by reason of the refusal of said corporation, under the domination of said John E. Savage, to re-negotiate said price in accordance with the agreement therefore made by said corporation, as aforesaid, said corporation lost the goodwill of said armed forces and of said Douglas Aircraft Corporation, Inc., and said last named Company refused to do further business with said corporation. [Aff. Monosmith, R. 198.]

(n) That it was unreasonable of said John E. Savage and said corporation to refuse to keep the aforesaid promises made by said corporation to said Douglas Aircraft Corporation, Inc., and to re-negotiate said price in accordance with the requirements of the agencies of the armed forces of the United States and of said Douglas Aircraft Corporation, Inc., as aforesaid. That such refusal was seriously detrimental to the best interests of said corporation and seriously imperilled any favorable relationship between said corporation and the aircraft companies engaged in the manufacture of airplanes and with the agencies of the armed forces of the United States, and that the said conduct of the said John E. Savage, and of said corporation under his control was in bad faith and unwarranted. [Aff. Monosmith, R. 198, 199; also Monosmith 201, 204.]

(o) That on January 5th, 1944, and while Lorraine's application for the appointment of a Receiver herein was pending and under consideration in said District Court, said John E. Savage secretly caused a purported meeting of the board of directors of said corporation to be held, and at said meeting said John E. Savage caused said corporation to accept an additional advancement of about $25,000.00 in money [R. 927], from him to said corporation and to execute its promissory note of that date in his favor, *payable upon demand,* in the principal sum

of about $40,000.00, which represented the said $25,000.00 then advanced and a prior unsecured and unpaid indebtedness of about $15,000.00 of said corporation to said John E. Savage, and to execute to said John E. Savage, as security for the payment of his said demand note, a trust deed upon all of the real property of said corporation and a chattel mortgage upon all of the tangible personal property of said corporation, and caused said trust deed and chattel mortgage to be placed on record in the office of the county recorder in Los Angeles County, California [R. 922-946, incl.].

(p) That in addition thereto, said Johr E. Savage, at said meeting of January 5th, 1944 [R. 926], caused said corporation to approve payment to him of $7,150.00 as a salary from and after the 25th day of June, 1942, unto the 25th day of May, 1943 [R. 919], and to approve the payment to his personal counsel of large sums of money, to-wit: several thousands of dollars, for services alleged to have been theretofore rendered, and particularly for services to be thereafter rendered in and about this litigation, and that said sums so authorized were exorbitant and excessive [R. 926].

(q) That at the time of the holding of said meeting, the power of said corporation to transact business had been suspended by reason of its failure to comply with the laws of Nevada, the State of its creation, in respect of its continuing right to exercise its corporate powers [R. 1080].

(r) That said corporation, under the domination of said John E. Savage and by reason of the fact that it had lost the goodwill of the agencies of the armed forces of the United States and of the companies engaged in aircraft production, as aforesaid, was engaged in post-war planning.

(s) That in the conduct of the business of said corporation and in its so-called post-war planning under the domination of said John E. Savage, as aforesaid, Lorraine was not consulted or informed as to that which was done, being done, or contemplated, notwithstanding that he owned and controlled, as herein set forth, 999,097 shares of the 1,194,450 shares of the outstanding capital stock of said corporation, and had done everything required of him personally to effect a redemption of said 550,472.65 shares of stock from said trust, and had done everything which he could do to procure the payment by said corporation to said John E. Savage of the indebtedness of said corporation to said John E. Savage as of the close of business on November 30th, 1943, to conclude the redemption of said shares from said trust.

(t) That the conduct of said John E. Savage in respect of said corporation and of said 550,472.65 shares of stock was in bad faith and a fraud upon Lorraine and upon said corporation. That said bad faith was evidenced by the fact that while Lorraine's petition for the appointment of a Receiver was pending and under consideration in said District Court, the judge of said court invoked and obtained the express promise of said John E. Savage in open court to release and discharge said trust deed and chattel mortgage which he had obtained on January 5th, 1944 [R. 1041], as aforesaid, as security for the demand note of said corporation to him of that date in the principal sum of about $40,000.00. That, notwithstanding said promise, said John E. Savage thereafter refused to, and did not, discharge or release either said trust deed or said chattel mortgage [R. 1055; R. 1066], and at all times since the execution thereof, as aforesaid, same remained in force and effect and upon the public records of Los Angeles County, California.

(u) That by reason of the conduct of said John E. Savage in procuring the execution and recordation of said trust deed and chattel mortgage, the credit of said corporation was substantially and seriously impaired, and that if the same were allowed to stand, the credit of said corporation would be seriously and irreparably impaired to the great damage of said corporation and all persons interested therein.

(v) That the trust declared by the judgment herein, under which said John E. Savage holds said 550,472.65 shares of stock, arose from a contract [R. 335] in writing prepared and executed by Lorraine and said John E. Savage. That the only defense of said John E. Savage to the claims of Lorraine herein, that said John E. Savage had acquired and held said 550,472.65 shares of stock in trust for Lorraine under said contract as urged by him herein, was that said written contract *"was phony"* [R. 838, 854], that *"it did not mean anything,"* that he had always been of said opinion, and was of said opinion at the time when he executed said contract, notwithstanding that he had never informed anyone that he understood or believed that said contract was phony or did not mean anything.

(w) That the determination of this controversy rests essentially upon factual and not legal considerations, that the rights and obligations of the parties are dependent upon findings of fact which were made upon the evidences herein, and as to which there were no controversial legal propositions involved, and that in such circumstances and because of the overwhelming weight of the evidences which favored the facts as found by the court herein, it was extremely improbable that said judgment would be reversed, and that therefore it was desirable that the business and assets of said corporation should be preserved pending the final determination of this cause upon appeal.

(x) That the best interests of said corporation required the appointment of a competent person as Receiver to administer its affairs pending appellants' appeal herein. That in the absence of such appointment, it was probable that by reason of the conduct of said John E. Savage in his control of said corporation, the business and assets of said corporation would be substantially and irremediably impaired and damaged during the pendency of said appeal to the irreparable injury of Loraine as the owner of so large an interest in the outstanding capital stock of said corporation. That in addition thereto, by reason of the conduct of said John E. Savage, it was necessary that a Receiver of said corporation be appointed to serve during said appeal in order to avoid multifarious litigation based upon the said conduct of said John E. Savage, and the necessity for said Lorraine to seek and obtain legal redress therefor, and

(y) That by reason of the facts herein set forth and then appearing to said District Court, said John E. Savage was a mere naked trustee of said 550,472.65 shares of stock, and held and exercised the rights and powers of a stockholder in ownership of said shares, only as such naked trustee, and in violation of his trust and in disregard of the wishes, demands and rights of Lorraine in respect thereof, and that solely by reason thereof, Lorraine was being prevented from exercising his rights and powers as the owner of the controlling interest of the capital stock of said corporation, in respect of the business and affairs of said corporation, as provided in Section 310 of the Civil Code of the State of California, and that said conduct of said John E. Savage was fraudulent as against said Lorraine and as against said corporation.

Upon the foregoing facts the appointment of a receiver is clearly approved by the law.

THE LAW.

A.

The Federal Courts Have Jurisdiction to Grant Equitable Remedies in Accordance With Their Own Rules, Which Have Been Developed Out of the English Chancery Practice, in Cases in Which Substantive Rights Have Arisen and Are Determinable Under State Law Under the Rule of Erie R. Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

It is now settled law *"that in so far as equitable remedies are concerned, Federal Courts are to grant them in acordance with their own rules which have been developed out of the English Chancery practice,"* and *"are subject to neither limitation nor restraint by State legislation."* (*Black & Yates v. Mahogany Association*, 129 Fed. (2d), 227, 233 (certiorari denied), and *Maxwell v. Enterprise Wallpaper Mfg. Co.*, 131 Fed. (2d), 400, 402.)

B.

If the Jurisdiction of the Federal Courts to Grant Equitable Remedies Were Limited by the Practices Approved by The Courts of the State Whose Law Is Determinative of the Substantive Rights of the Litigants, Nevertheless, the Appointment of a Receiver Herein Was Proper Because Approved by the Law of California.

Section 564, subdivisions 3, 4, and 7, of the California Code of Civil Procedure, expressly provide for the appointment of a Receiver.

(3) *"After judgment*, to carry the judgment into effect."

(4) *"After judgment*, to dispose of the property according to the judgment, *or to preserve it during the pendency of an appeal."*

(7) "In all other cases where Receivers have heretofore been appointed by the usages of Courts of Equity."

In *Delamoy v. Quetu*, 73 Cal. App. 627, 636, the Court said:

"This rule is generally recognized, that Courts have jurisdiction to appoint receivers for the purpose of *preserving assets pendente lite.*" The term *"Pendente Lite"* means, *"pending the continuance of an action;* while litigation continues." (Bouviers Law Dictionary, p. 925).

The factual conditions which properly invoke the equitable remedy of an appointment of a Receiver are varied and many. These include: *"fraud"; "positive misconduct"; "gross mismanagement"; "dissensions"; "honest differences of opinion* which result in making it impossible for the corporation to carry on its business to advantage"; and *"a necessity for the preservation of assets."* (*Boyle v. Superior Court,* 176 Cal. p. 671, 674, and *Misita v. Distillers Corp., Ltd.,* 54 Cal. App. (2d) 244, 252.)

In the *Boyle* case, *supra,* the court approved the appointment of a receiver in a proceeding *"which was not directed toward the closing of the affairs of the corporation or toward an attempt to dissolve it, but was designed merely to place the assets of the corporation in safe hands."*

In the *Misita* case, *supra,* the court said, *"It is well settled that a court of equity has inherent power in a proper case to appoint a temporary receiver for a solvent,*

going corporation at the instance of stockholders, on the ground of fraud or gross mismanagement * * *."

In *Clark* on Receivers, Vol. 2, p. 1027, it is said:

> "Federal Courts, however, have almost from their inception asserted their inherent power to appoint receivers of corporations *pendente lite,* at the instance of creditors or others, that is, when a main suit has been brought in the Federal Court, the Court has maintained its inherent power to appoint a receiver *to preserve the property* of a corporation from waste, destruction or dissipation."

This text is supported by the cases of ***Wallace v. Loomis,*** 97, U. S. 146, 24 L. Ed. 895; *Miltenberger v. Logansport Ry. Co.,* 106 U. S. 286, 27 L. Ed. 117; *Hutchinson v. American Palace Car Company,* 104 Fed. 182; and *D. A. Tompkins v. Catawba Mills,* 82 Fed. 780.

Receivers are frequently appointed for the purpose, among others of *preserving the goodwill and credit* of the business of the corporation. (*Clark* on Receivers, Vol. 1, pp. 192, 193 and 531; *Scripps v. Crawford,* 123 Mich. 173, 179; 81 N. W. 1098.)

An interesting discussion of the rule and the circumstances of its application is found in Vol. 43 A. L. R. at p. 260.

ARGUMENT.

The Review Here in Respect of the Appointment of a Receiver by the Trial Court Is Limited to the Inquiry Whether the Trial Court Has Abused Its Discretion.

Clearly, the District Court had jurisdiction in the circumstances of this case to appoint a Receiver. Petitioner's criticism of the order must therefore be denied, unless it may be said from a view of the entire record that the order of appointment was such an abuse of discretion that it has resulted in a miscarriage of justice. (*Lent v. H. C. Morris Co.*, 25 Cal. App. (2d) 305, 308; *Misita v. Distillers Corp., Ltd.*, 54 Cal. App. (2d) 244, 252.)

The District Court Did Not Abuse Its Discretion. Upon This Record the Court Was Justified in Determining That Appellant John E. Savage Was Guilty of Fraud Wherein as a Naked Trustee of the 550,472.65 Shares of Stock Which He Held in Trust for Respondent He Exercised His Influence in His Control of Appellant Corporation Adverse to the Interest of Said Corporation, and of His Beneficiary David G. Lorraine—and for His Own Profit.

The evidences before the District Court at the time of the appointment of a Receiver herein clearly show that in his exercise of control over said corporation said John E. Savage was acting adversely to the interest of his beneficiary, David G. Lorraine, and of said corporation, by *excluding Mr. Lorraine* from the business of said corporation *contrary to the agreement* of the parties [Ptfs.' Exh. 1, Tr. Vol. I, pp. 335, 336], and by causing said corporation to execute to him (Mr. Savage) a promissory note for a large sum of money, *payable on his demand*, and to secure the payment thereof by the execution of a

trust deed upon all of the company's real property and a chattel mortgage upon all of the company's personal property [R. 922 to 946, Minutes of Jan. 5, 1944], and by voting to himself (Savage) a large and unjustifiable sum as compensation for services over a period [R. 919] of time which had expired six months before the meeting [R. 926, 919], and by authorizing payment of large sums to his personal attorneys for *services not yet rendered* [R. 926], and by excluding said Lorraine from access to important corporate records and information to which he was entitled, and by withholding such information from him [R. 982], and by refusing to conform to the agreement Mr. Lorraine had made on behalf of the Lorraine Corporation with the Douglas Company to adjust the prices of the valves when the cost of production had been ascertained.

> *"A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary"* (Sec. 2231), and that *"Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."* (Sec. 2234.)

The character and completeness of the domination of the directors of this corporation by this *defaulting trustee*, Savage, to the service of his personal interests at the expense of the corporation was demonstrated to the District Court by many incidents. Reference to three should suffice.

(1) Mr. Demoss of whom it will be remembered that he was (and is) personal counsel for Savage and that he was not (and is not) a stockholder; that he was (and is) an appointee to the offices of director, secretary, and treasurer [R. 1013 and R. 918] under the power which Savage

derived from his position as trustee for David G. Lorraine, testified at the hearing herein on January 6, 1944 [R. 947 and R. 918], in respect of corporate compensation to Savage that: "* * * *I have never seen* [Tr. 56, line 23] *any resolution in the minutes of the corporation, and I have looked for it, paying him for his services,*" * * * and [R. 947] "Q. *Prior to that time*" (January 5, 1944) "*had any such resolution been passed? A. No.*" [R. 918.]

Following this testimony, the Judge of the *trial court expressed his doubt* [R. 948, lines 3] that Savage, as president of this corporation, could collect $7,100.00 in salary for the period from June 25, 1942, to May 25, 1943, under a resolution first adopted on January 5, 1944 [R. 918, bot. pg.].

At the hearing the Court directed the production of all of the minutes of the board of directors of this corporation [Tr. p. 54, line 24]. These were produced at the hearing on January 6th. These minutes [Ptfs.' Exh. 7; R. 1017] recite that, at the directors' meeting of May 25, 1943, at which *only Savage and Demoss were present*, a motion was "* * * duly made and seconded and by the affirmative vote of all present, it was unanimously resolved that the salary of the president of the corporation be fixed at $750.00 per month during such months as the business of the corporation amounts to less than $50,000.00 per month, etc." These minutes were signed by Demoss as secretary and Savage as president. Since, as the minutes state, only Savage and Demoss were present and the motion was both made and seconded, and was adopted by the affirmative *vote of all present*, it necessarily follows that Demoss either made or he seconded this motion, and that he voted for its adoption.

In these circumstances, one or two conclusions is necessary, either (a) *Demoss testified falsely* when he testified on January 6th that no such resolution had been passed prior to January 5, 1944, and that he had never seen any such resolution on the books, although he had looked for it; or (b) *somebody falsified the records* of this corporation wherein on January 10th it was made to appear that on May 25, 1943, upon a motion made or seconded by Demoss, and upon his vote, such a resolution was passed, as shown by the minutes of that meeting which were signed by Demoss and Savage.

The inference is persuasive that *these corporate records were falsified* to bolster the salary claim of Savage as against the criticism and doubt expressed by the trial court, four days before. This single incident fully supports the trial court's belief that the conduct of Savage and his obedient appointees in their control of this corporation had been, and would probably continue to be, fraudulent as to the corporation and its stockholders, and to Mr. Lorraine. Such base conduct, in either alternative, is *gross mismanagement*, and *fraudulent*.

(2) While Lorraine's application for appointment of a Receiver was pending, and under consideration by the Court, and while this trustee Savage was asking and receiving extensions of time to prepare their resistance to the applications, and while *the franchise of the corporation was under suspension*, Savage and his obedient appointees secretly held an after-thought meeting of themselves as directors, and did these things:

(a) By the votes of Demoss and Rutherford, Savage advanced $25,000.00 to the corporation, and that sum and about $15,000.00 theretofore advanced by Savage upon the company's unsecured note which would not mature

until June, 1945, were immediately consolidated into a company note to Savage, made *payable on demand;*

(b) By the votes of Demoss and Rutherford, this *demand note* for $40,000.00 was secured by a Trust Deed on the company's real property, and a chattel mortgage on the company's tangible personal property, and these were immediately recorded;

(c) By the votes of Demoss and Rutherford, a claim by Savage for $7,150.00 was *approved and ordered paid;*

(d) By the votes of Rutherford and Savage the bill of Demoss for $2,387.00, for legal services, was *approved and ordered* paid;

(e) By the votes of Rutherford and Savage the bill of A. J. O'Connor for $1,500.00 legal services was *approved and ordered* paid; and

(f) By the votes of Rutherford and Demoss the bill of Savage for $15,542.50 was *approved and ordered paid.*

It will be remembered that Rutherford became a director and vice-president, at that meeting. It is obvious that Rutherford did not know, and Demoss testified that Rutherford did not know, anything about the merits of the matters for which he voted.

We have referred to this meeting of January 5th as a *"secret"* and as an *"after-thought"* meeting. These are not mere figures of speech—they are literal truths.

That this meeting was an *after-thought* is demonstrated by the fact that the meeting which next preceded this meeting, was held on December 29th and *that meeting was adjourned to January 7th* [R. 1029]. The hearing on Lorraine's application for the appointment of a receiver had been continued, at the request of Savage, until January 6th. Following this Court adjournment on Janu-

ary 3rd, under the lash of his guilty conscience; his sense that his conduct was not favorably impressing the conscience of the Chancellor; his desire to get a stranglehold on the assets of the corporation before his power should be shorn, and his fear that, if he delayed action until the adjourned meeting on the 7th, something might happen in Court on the 6th that would prevent the consummation of his schemes, Savage conceived this expedient of holding this meeting *two days before the date* to which the meeting of December 29th had been adjourned and one day before the date to which the Court hearing had been adjourned, in order that he might secure the stranglehold which he on that day took upon assets of this corporation, by *demand note, trust deed* and *chattel mortgage*, with the aid of his subservient and obedient appointees.

This record does not show anything else which would prompt the hurried holding of this meeting of strangulation two days before the date to which the meeting had been adjourned on December 29, 1943, and one day before the date to which the Court hearing had been adjourned at the urgent request of Savage.

That this meeting of January 5th was intended to be, and was, a *secret* meeting, is equally clear. The only independent director on this board during the tenure of Savage was Wagner. Between December 29th and January 5th, Savage obtained Wagner's resignation. Consequently, the meeting of January 5th was not attended by Wagner. Hence this source of inside information to Lorraine ceased to exist. The plans for this meeting, and the happenings thereat, were sealed in the bosom of Savage and his servants, and they did not tell.

The records of the several hearings in the District Court upon his receivership matter, preceding January

6th, clearly show that it was the attitude of the Court, and the understanding of Counsel, that the status quo would be maintained until the Receivership application should be determined. Otherwise the injunctive processes of the Court would have been invoked. Yet the fact of this meeting of January 5th was not revealed to the Court or to Lorraine's counsel at the hearing on the 6th until elicited by an incidental inquiry. Even then the facts that Savage, on the day before, had obtained this demand note, trust deed and chattel mortgage were not revealed to the Court or to Lorraine's counsel. These facts were not revealed until the Court hearing on January 10th. They were then revealed by the production of the corporation minutes as theretofore ordered by the Court. The circumstances of this concealment were recognized and were severely criticized by the trial court at the hearing on the 10th when the revelation was made [See Tr. of January 10th, R. 974; R. 998; Appendix Tr. 31 to 58; R. 1032 to 1037; 1042 to 1045, R. 1047, R. 1065, R. 1066 and R. 1067].

This conduct, clearly, was both fraudulent, and gross mismanagement; each of these is a ground for the appointment of a receiver. This conclusion derives added emphasis from the fact that at this *secret* and *afterthought* meeting, Savage and his obedient servants ordered corporate disbursements to themselves, and to A. J. O'Connor, the other attorney for Savage, of more than $26,000.00 of the corporate funds.

(3) At the Court hearing on January 10th, after the trial Judge had excoriated the conduct of Savage in his control of the corporation, the trial Judge obtained from Demoss, as one of counsel for Savage, the promise that during the adjournment of this hearing to the 17th noth-

ing would be done to disturb the *status quo*, except to cancel the trust deed and chattel mortgage as Savage in open court at that hearing had promised to do. The Court said and Demoss replied as follows [See Appendix Transcript, January 10, 1944, page 58]: "The Court: I will ask Mr. Demoss, as an officer of this court, to inform the court of any steps which may be taken which are contrary to the spirit that is expressed today, and I am sure that your obligation to the Court will transcend any obligation you may feel as a director, and *I am going to bind you to that now*. Mr. Demoss: *That will be done.*"

These promises were not kept. The trust deed and the chattel mortgage have never been cancelled. Savage has refused to keep that promise to the court. On January 14th, four days after the hearing at which these pledges of good faith were made, Savage and his servants, Demoss and Rutherford, held another directors' meeting [R. 1057]. At this meeting, Savage and Demoss as secretary, in violation of their pledge to the court, spread upon the corporate records, at great lengths, false and defamatory matter respecting this litigation, the trial Court, and the Lorraines; and Savage and Rutherford authorized and directed the payment of an additional $4,500.00 of corporate funds to Demoss and O'Connor for services they might render and expenses they might incur on behalf of the corporation in event a Receiver should be appointed [R. 1062 and R. 1068]. Upon this record it is a reasonable inference that by these actions Savage was providing, while in control of the corporation, for the payment by the corporation of the fees and expenses incident to his *own personal litigation with Lorraine*. Clearly, the interest of this corporation in this

litigation does not justify any such payments of money as it has been requested to pay, and has paid, under its fraudulent and gross mismanagement by Savage.

These *payments made during a period of nine days* during the last fifteen days that said application for the appointment of a Receiver was pending, *aggregate more than $31,000.00.* This is the sum of $26,579.00 approved and ordered paid at the meeting of January 5th and $4,500.00 approved and ordered paid at the meeting of January 14th, as herein set forth.

Upon these evidences, the trial court was clearly justified in concluding that Savage was determined to circumvent the judgment of the court during the pendency of his appeal therefrom, by subjecting the *liquid assets* of the corporation to the payment of exorbitant and unwarranted sums to himself and to his attorneys, and by subjecting the *fixed assets* of the corporation to a stranglehold lien to secure the payment, *on his demand,* of a large sum of money which he knew the corporation could not pay. Such conduct is fraudulent in every language.

This conduct of Savage and his obedient appointees on the board of directors clearly indicated the absolute necessity for the appointment of a receiver to preserve the assets of the corporation preceding this appeal from the judgment.

In these circumstances a refusal to appoint a receiver to preserve the assets of this corporation would have been a clear abuse of discretion.

Question 4. The order of the District Court which directed the receiver to pay $27,804.00 to the Douglas Aircraft Company, Inc., is fully supported by the facts and the law.

The Facts.

The Background Against Which the Order Was Made. For some time prior to the Receiver's appointment, the Douglas Aircraft Co., Inc., hereinafter termed Douglas, had been an important customer of The Lorraine Corporation, hereinafter termed Lorraine [Rec. 253, 275, 284], and a controversy had arisen between them. It appears from the affidavit of B. C. Monesmith [Rec. 197-200], who is the manager of the outside manufacturing division of Douglas [Rec. 197], that this controversy arose as follows: Douglas, through that division, had placed with Lorraine several purchase orders calling for the manufacture of approximately fifteen thousand Douglas parts known as constant flow valve assemblies [Rec. 197] which were semi-experimental at the time such orders were placed [Rec. 197]. Some months thereafter, David G. Lorraine, at that time General Manager of Lorraine, requested Douglas to make an upward revision of the contract price on the ground that because of certain unforeseen causes, the cost of production was running substantially in excess of the contract price and Lorraine would be financially unable to perform its contract without a price adjustment [Rec. 197-198]. In reliance upon these representations, Douglas agreed with The Lorraine Corporation and the said David G. Lorraine to an upward revision of the price [Rec. 198]. The assent of Douglas to such upward revision was predicated upon an *"understanding that a reduction would be made (in the revised price) if and when sufficient experience had been gained to arrive at a fair price"* [Rec. 198][1], but before it could

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[1]All italics appearing hereinafter are those of this appellee unless the contrary is specifically noted.

be effected internal difficulties arose within Lorraine, as a result of which David G. Lorraine was forced to retire from active control, and such control was assumed and exercised by appellant John E. Savage [Rec. 198]. Mr. Savage repeatedly refused to recognize this commitment to readjust prices, although Douglas made demand for negotiations leading thereto [Rec. 198]. Because of this attitude of Mr. Savage and in order to protect the interests of Douglas and the United States Government, Douglas accumulated approximately $50,000.00 in unpaid invoices pending a "renegotiation of prices" with Lorraine [Rec. 198-199].

The record does not disclose that appellant Savage ever advanced the claim that he was present at the time this agreement between Douglas and Lorraine, acting through Mr. D. G. Lorraine, was entered into, or *testified to any facts* tending to impeach these sworn statements of Mr. Monesmith. On the contrary, Mr. Savage merely states in his counter-affidavit [Rec. 217-231] that Douglas had not advised him that it had accumulated these unpaid invoices because he had refused to reduce the contract price [Rec. 225-226] and that he "believes" that Douglas refused to pay the same "for the deliberate purpose of creating financial embarrassment" to Lorraine [Rec. 226].

Mr. Monesmith is corroborated by the affidavit of Mr. Arthur Hogan, who states [Rec. 268-269]: That he is a member of the legal staff of Douglas and is familiar with the dealings between Douglas and Lorraine; that payments otherwise due Lorraine in the sum of approximately $60,000.00 have been withheld; that the purpose of this withholding was in order to secure the claim to price adjustments asserted by Douglas which Mr. Savage had denied to be valid and existing and that such sums were not withheld in the period during which David G. Lorraine

was in control of said Lorraine for the reason that *"David G. Lorraine had not denied the existence of said claims and has indicated a willingness to aid in their adjustment."*

Mr. Monesmith is further corroborated by the following facts: Mr. David G. Lorraine, who was found to be the owner of a majority of the stock of Lorraine, and hence adversely affected by an unwarranted reduction of such price, filed various affidavits in this proceeding. *He nowhere denied, however, that the agreement with Douglas was as Mr. Monesmith had stated* and, on the contrary, not only made no objection to the order made on the petition here discussed, but specifically stated that he did not oppose the compromise with Douglas eventually made [Rec. 1209, 1239].

The affidavit of his wife, Mrs. Sara R. Lorraine [Rec. 206-209][2] is pregnant with the admission of the truth of Mr. Monesmith's statement. She stated: That she was personally familiar with the conditions under which The Lorraine Corporation had claimed that Douglas was indebted to it and with the attitude of Douglas in respect *"of a renegotiation of the price to be paid for the products processed and delivered by" Lorraine,* and that she believed that it was impossible for Lorraine, under the management and control of Mr. Savage, *"to accomplish any reasonable renegotiation of said matter."* [Rec. 207, 208].

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[2]This affidavit was filed in support of the motion to appoint a receiver.

The Prospect of the Loss of the Douglas Business and the Offer by Douglas of the Immediate Advance of $20,000.00. Prior to the time of the appointment of the Receiver, the following impasse had been reached:

1. Douglas desired and thought it was to the best interests of the government that Lorraine continue to produce such valves [Rec. 202]. Mr. Savage had refused to recognize the promise of Lorraine to effect a downward price adjustment, although Lorraine's costs had become stabilized [Rec. 202, 1093]. The refusal of Mr. Savage to recognize such a commitment [Rec. 202, 1093], although it *"is and has been recognized by David G. Lorraine"* [Rec. 202, 1097], had resulted in a loss of confidence by Douglas in the integrity of the "present management" of Lorraine [Rec. 202].

2. Because of the insecurity of the managerial position of Mr. Savage resulting from the judgment of the District Court, and lack of confidence in him because of his inexperience in the manufacturing field and his unwillingness to recognize commitments, Douglas felt that it "will be constrained to terminate all relationship with The Lorraine Corporation as its source of supply if it continues under its present management" [Rec. 203].

3. There had been withheld from payments otherwise due Lorraine the sum of approximately $60,000.00 [Rec. 268]. Douglas had stated that if a receiver or receivers acceptable to Douglas were placed in control of Lorraine [Rec. 268-269], or such management as would reasonably assure Douglas that future orders would be fulfilled [Rec. 1103, 1105], the reasons for the withholding of said sums would no longer exist [Rec. 268-269] and that at least $20,000.00 of said withheld sums would immediately be made available as an advance to Lorraine [Rec. 269,

1104], provided: That Lorraine would agree that a controversy existed which was subject to settlement [Rec. 1102]. That settlement would be made without reliance on technical rules of evidence [Rec. 1102] on a factual basis depending upon the margin of profit realized from the manufacture of the valves [Rec. 1103], as established by an independent cost accounting made along lines and by parties satisfactory to the Army Procurement Office [Rec. 1102]. That Lorraine be shown to be in a position to bid for and to receive and perform an additional contract of some 10,000 additional valves [Rec. 1103-1105].

4. Long prior to the employment of Mr. Elliott as one of counsel for Mr. Lorraine [Rec. 1089], Douglas had informed Mr. Elliott of the controversy [Rec. 1091] and of its base [Rec. 1092-1093] and that it "might result in a suit by The Lorraine Corporation" [Rec. 1091]. The Army Procurement officer had insisted "that the price of $23.00 and something was still too high and that they would not recognize that as a reimbursable item to Douglas * * * under its cost plus fixed fee contracts" and was insisting upon "further cost accounting and a revision of the price" [Rec. 1093], and as Mr. Savage had refused to recognize any possibility of a revision of price below $23.00 it looked very much as if litigation would follow [Rec. 1093].

5. On December 29, 1943, the Board of Directors of The Lorraine Corporation adopted a resolution directing Mr. Demoss to write Douglas stating that the account for valves delivered in October and November, 1943, was still unpaid and that if the account was still unpaid on January 10, 1944, Lorraine "would be compelled to take action on the same," and on December 29, 1943, Mr. Demoss wrote such a letter to Douglas [Rec. 263, 264, 267, 1027-28].

The Situation Immediately Prior to, and at the Time of the Appointment of the Receiver. Immediately prior to the appointment of the Receiver an impasse had been reached which threatened to result in the loss of a valuable customer to Lorraine. Obviously, the situation called for a determination as to whether good business policy dictated that the business of Douglas be retained and the sum of $20,000.00, on account, be secured by an agreement to settle the dispute by arbitration or negotiation as Douglas proposed, or be lost—as appellant Savage then and now insists be done—by a refusal to determine the dispute except by formal court action.

The Action of the Receiver. With knowledge of these facts, the Receiver filed his Petition No. 1 for Instructions. An inspection of the petition and the attached draft of agreement [Rec. 286-292] discloses that the Receiver merely sought the direction of the court as to whether he should execute the contract proffered by Douglas "expressly recognizing the existence" of the admitted controversy between the parties [Rec. 291] and agreeing that *"subject to the approval"* of the court the controversy should "be settled by arbitration, or otherwise, as may hereafter be agreed upon by the parties hereto, and that said settlement shall be made without the limitations of technical rules of evidence or technical limitations relating to procedure, or strict or technical interpretation of the provisions of said purchase orders" [Rec. 291].

The Order of the Court. Upon the hearing the court ordered the Receiver to execute the contract, finding that it was to the best interests of the estate, and of all persons interested, that the contract be executed because thereby [Rec. 294-295]: (a) A businesslike and expedious arrangement would be made for the satisfactory ad-

justment of said dispute; (b) A satisfactory relationship with Douglas would be restored, whereby substantial additional contracts might be obtained, and (c) The advancement of said $20,000.00 would be a very substantial present benefit and advantage to the receivership estate.

Argument.

In our view, when the evidence before the Court in a matter of this character is contradictory, the determination of the trial court is conclusive unless it is clearly wrong. *Gila Water Co. v. International Finance Corp.* (C. C. A. 9) 13 Fed. (2d) 1, 2; *Easton v. Brant* (C. C. A. 9) 19 Fed. (2d) 857, 859; *Graff v. Town of Seward, Alaska* (C. C. A. 9) 20 Fed. (2d) 816, 817.

The order in this case can, however, be sustained without reference to this rule for in truth the evidence which we have here summarized is uncontradicted. To what facts do the petitioners point to rebut these sworn statements which the Court had the right to accept? None. They merely rely upon a determination to fight a lawsuit, based on the assertion that the Douglas Company had no legal defense. To particularize: Mr. Savage does not, because he cannot, deny the understanding referred to in the preceding pages. He cannot do so for the simple reason that he simply was not there when these commitments were made. The evidence establishing the agreement to readjust the price thus stands uncontradicted. But, says Mr. Savage, despite the fact that Lorraine through its representative promised to readjust the price and despite the fact that Douglas acted on that promise, I can still defeat the Douglas claim because the purchase order fixed a definite price and, forsooth, you cannot modify a written agreement by an oral promise. This, of

course, is not the law. A written agreement may be modified by an oral agreement upon which the other party has acted to his disadvantage. In other words, an executed oral agreement can modify a written agreement of the most solemn kind. Sec. 1698, Civil Code of California; *Anderson v. Adler,* 42 Cal. App. 776, 779.

Under the law of California which governs the interpretation of this contract, a written memorandum for the manufacture of goods, not in existence, is not governed by the Statute of Frauds. Such an agreement is not an agreement of sale but is an agreement for work and labor, and is governed not by the one year but by the three-year Statute of Limitations. Sections 1624a and 1724, Civil Code of California; Sec. 1973a, Code of Civil Procedure of California; *Flynn v. Doherty,* 91 Cal. 669, 671; *Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 200.

The record incorporates some of the purchase orders. A characteristic one appears at page 235 of the record. We doubt that it constitutes a complete agreement under the law of California. Whether it be considered a memorandum under the Statute of Frauds for the sale of goods or an agreement for work and labor it does not contain all the terms of the agreement and is insufficient in law to call for specific performance. But even if we assume that it has all the elements entitling it to be enforced in law, there still remains the significant fact that the area of determination of the Chancellor is as broad as the need of the particular case. Equity arose because law was unable to cover certain situations. Thus, in a matter of receivership, the judge is forever the Chancellor and the question of the rightness or wrongness of his determination of a fact must be judged by equitable standards. Business

wisdom calls for the avoidance of litigation. Adjustment, negotiation and arbitration are the methods by which modern business men settle their differences. The legalistic concepts which stood in the way of making enforceable contracts for arbitration and agreements to arbitrate were finally removed from the Codes of California, not by lawyers but by the California Chamber of Commerce at the instance of the business men of this state. Shall it be said then that, when a Chancellor in the administration of an estate exercises his discretion in the manner in which such discretion is exercised by an intelligent manager of a business, the Chancellor has thereby abused his discretion? The answer is obvious.

The petitioners do not point out the basis of their assertion that there was no legal merit in the claim of Douglas. As we have seen, the record discloses that the representatives of Douglas, present when the upward revision of the contract price was agreed to, unite in asserting that this upward revision was predicated on an agreement that this price would be reduced when sufficient experience had been gained to arrive at a "fair price." It further discloses that the Douglas employees would testify that Mr. David G. Lorraine, the only representative of Lorraine then present, had not denied the existence of the claim based upon this agreement, but had rather indicated a willingness to aid in such adjustment. Mr. Lorraine did not deny either the agreement or that his attitude was as represented. Although he was in Court at the hearing [Rec. 1153], counsel for appellant failed to examine him on that question. Mrs. Sara R. Lorraine, who acted as Secretary of The Lorraine Corporation at the time the original adjustments were made and was familiar with

the conditions and with the controversy, did not deny the agreement to adjust as alleged by Douglas.

Certainly these facts establish the existence of a bona fide dispute, and afford ample support for the order directing in effect that, in the event of a failure to agree through negotiation, settlement should be made by arbitration *subject to the approval of the Court.*

One cannot read the record and escape the conclusion that the opposition of petitioners to the making of this order, which resulted in present payment to the receiver of the sum of $20,000.00, was motivated by a desire to prevent the corporation from being in a position to make the tender to Savage of the moneys found to be due to him by the judgment previously entered. Wholly apart from any advantage accruing from the particular application of these moneys, the advantage accruing to the receivership estate from their receipt cannot be denied.

We know of no rule of law or logic which dictates that a court, prior to directing its receiver to settle a claim by negotiation or arbitration, must determine the "legal merit" of the dispute. Surely, neither a court nor its receiver is compelled to close its eyes to the hazards of alienating a good and indeed essential customer and to insist that every technical defense to a disputed claim must be litigated in a court, as distinguished from a settlement of the dispute by negotiation or arbitration on the basis of fairness and equity. While it is, of course, true that the Receiver did not testify in terms that the claim of Douglas was possessed of "legal merit," he did testify that he did "believe as a good business man of experience that regardless of the rights or wrongs in this controversy, and in view of the possibility of further business with the

Douglas Company, it is *good business policy to arbitrate the controversy,* regardless of whether the company is absolutely right and the other wrong" [Rec. 1158], and that his own experience in his own business "approves of this system of arbitrating when a controversy exists with a good customer" [Rec. 1159].

In the foregoing we have assumed that the order discussed is a final appealable order. We are, however, of the view that it is not such an order. In that which follows we give our reasons for this contention.

On July 28, 1944, the Honorable Circuit Court filed its opinion, "Upon Application for Leave to File Petition for Writ of Prohibition," in this cause. That opinion establishes the law of this case to be that "the order appointing the Receiver is for the general administration of the businses of the petitioning corporation" (Op. p. 2). In our view, the Receiver had ample authority under the order of his appointment to have conducted the negotiations with Douglas, here attacked [Rec. 279-281], upon the principle announced by this court in the case of *Holeman v. Natural Soda Products Co.*, 96 Fed. (2d) 277, 279.

This Order here discussed is in our view not final for the purposes of appeal in that it "does not terminate the litigation between the parties on the merits of the case, or on some severable phase hereof." (*Crooker v. Knudsen* (C.C.A. 9), 232 Fed. 857, 858.)

It does not involve "the determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal."

Odell v. H. Batterman Co. (C. C. A. 2), 223 Fed. 292, 295. On the contrary, it seems to us clearly interlocutory in that while the Receiver was ordered to negotiate or arbitrate the matter with Douglas, the order contemplated further proceedings in the District Court as the result of such negotiation or arbitration. Any settlement was by the terms of the order not to be effective unless it thereafter received the approval of the District Court [Rec. 291]. It, therefore, was interlocutory within the rule of: *Brush Electric Co., et al. v. Electric Imp. Co. of San Jose* (C.C.A. 9), 51 Fed. 557, 561; and *Waialua Agr. Co., Ltd. v. Christian* (C.C.A. 9), 52 Fed. (2d) 847; *Beighle, et al. v. LeRoy, et al.*, 94 Fed. (2d) 30, 31. This Honorable Court has directly held that an order of a District Court requiring the parties to a pending action to proceed to arbitration and staying trial of the action pending filing of an award is not a final decree appealable under Section 128 of the Judicial Code (28 U.S.C.A. 225) nor is it one in effect granting an injunction appealable under Section 129 (28 U.S.C.A. 227). *Schoenamsgruber v. Hamburg-American Line*, 294 U. S. 454, 456; 55 Sup. Ct. 475; 79 L. Ed. 989, 991.

Surely, it cannot be *presumed* that a Receiver will ultimately recommend or the court approve a settlement which is improvident or unfair. It follows that petitioners seek

to appeal from an order from which, in the very nature of things, no prejudice could flow. Such matters are not assignable as error, however they may have been ruled. *Greenleaf's Lessee v. Birth,* 30 U. S. 132, 135, 5 Pet. 132; 8 L. Ed. 72, 73; *Jerome v. McCarter,* 94 U. S. 734, 740; 24 L. Ed. 136, 139.

As the approval of the District Court of the settlement eventually arrived at between the parties was sought and granted, it follows that the order here discussed became moot upon the entry of that order.

We respectfully submit that the pending petition should be denied.

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